

Oct 13, 2022

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

DARIN R.,¹

Plaintiff,

v.

KILOLO KIJAKAZI, ACTING
COMMISSIONER OF SOCIAL
SECURITY,²

Defendant.

No. 2:21-CV-00086-ACE

ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT AND REMANDING FOR
ADDITIONAL PROCEEDINGS

ECF No. 17, 18

BEFORE THE COURT are cross-motions for summary judgment. ECF No. 17, 18. Attorney Christopher H. Dellert represents Darin R. (Plaintiff); Special Assistant United States Attorney Katherine B. Watson represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 8. After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS** Plaintiff's Motion for Summary Judgment; **DENIES** Defendant's Motion for Summary Judgment;

¹To protect the privacy of plaintiffs in social security cases, the undersigned identifies them by only their first names and the initial of their last names. *See* LCivR 5.2(c).

²Kilolo Kijakazi became the Acting Commissioner of Social Security on July 9, 2021. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Kilolo Kijakazi is substituted for Andrew M. Saul as the defendant in this suit. No further action need be taken to continue this suit. *See* 42 U.S.C. § 405(g).

1 and **REMANDS** the matter to the Commissioner for additional proceedings
2 pursuant to 42 U.S.C. § 405(g).

3 **JURISDICTION**

4 Plaintiff filed applications for Supplemental Security Income and Disability
5 Insurance Benefits in February 2019, Tr. 230, 240, alleging disability since 2016,
6 due to depression, schizophrenia, bipolar disorder, anxiety, social anxiety, mood
7 swings, sleep deprivation, no concentration, lethargic/no energy, and panic. Tr.
8 273. Plaintiff subsequently amended the alleged onset date to November 1, 2018.
9 Tr. 15, 44. The applications were denied initially and upon reconsideration.
10 Administrative Law Judge (ALJ) Stewart Stallings held a hearing on September 1,
11 2020, Tr. 37-66, and issued an unfavorable decision on September 29, 2020,
12 Tr. 15-26. The Appeals Council denied Plaintiff's request for review on December
13 11, 2020. Tr. 1-5. The ALJ's September 2020 decision thus became the final
14 decision of the Commissioner, which is appealable to the district court pursuant to
15 42 U.S.C. § 405(g). Plaintiff filed this action for judicial review on February 16,
16 2021. ECF No. 1.

17 **STATEMENT OF FACTS**

18 Plaintiff was born on October 4, 1979, Tr. 240, and was 39 years old on the
19 amended alleged disability onset date, November 1, 2018, Tr. 44. He completed
20 high school and one year of college, Tr. 43, 274, and has past work as a prep cook,
21 short-order cook, and hotel manager, Tr. 56-57.

22 Plaintiff's disability report indicates he stopped working on June 2, 2016,
23 because of his conditions. Tr. 273. At the administrative hearing, Plaintiff
24 testified he stopped working following a "nervous breakdown" in November 2018.
25 Tr. 45. He stated he could not work because he has a difficult time working with
26 others and experiences paranoia in public. Tr. 47. Plaintiff also discussed his
27 depression, ADHD, hearing voices, lack of concentration, and medication side-
28 effects. Tr. 46, 48-49. Plaintiff indicated the voices he hears encourage him to do

1 good deeds and be a kind person. Tr. 51-52. Plaintiff testified he wanted to be a
2 productive member of society but did not have the will to do so. Tr. 54.

3 **STANDARD OF REVIEW**

4 The ALJ is tasked with “determining credibility, resolving conflicts in
5 medical testimony, and resolving ambiguities.” *Andrews v. Shalala*, 53 F.3d 1035,
6 1039 (9th Cir. 1995). The ALJ’s determinations of law are reviewed *de novo*, with
7 deference to a reasonable interpretation of the applicable statutes. *McNatt v. Apfel*,
8 201 F.3d 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed
9 only if it is not supported by substantial evidence or if it is based on legal error.
10 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is
11 defined as being more than a mere scintilla, but less than a preponderance. *Id.* at
12 1098. Put another way, substantial evidence “is such relevant evidence as a
13 reasonable mind might accept as adequate to support a conclusion.” *Richardson v.*
14 *Perales*, 402 U.S. 389, 401 (1971), *quoting Consolidated Edison Co. v. NLRB*, 305
15 U.S. 197, 229 (1938). If the evidence is susceptible to more than one rational
16 interpretation, the Court may not substitute its judgment for that of the ALJ.
17 *Tackett*, 180 F.3d at 1098; *Morgan v. Commissioner of Social Sec. Admin.*, 169
18 F.3d 595, 599 (9th Cir. 1999). If substantial evidence supports the administrative
19 findings, or if conflicting evidence supports a finding of either disability or non-
20 disability, the ALJ’s determination is conclusive. *Sprague v. Bowen*, 812 F.2d
21 1226, 1229-1230 (9th Cir. 1987). Nevertheless, a decision supported by
22 substantial evidence will be set aside if the proper legal standards were not applied
23 in weighing the evidence and making the decision. *Browner v. Secretary of Health*
24 *and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988).

25 **SEQUENTIAL EVALUATION PROCESS**

26 The Commissioner has established a five-step sequential evaluation process
27 for determining whether a person is disabled. 20 C.F.R. § 416.920(a); *Bowen v.*
28 *Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one through four, the claimant

bears the burden of establishing a prima facie case of disability benefits. *Tackett*, 180 F.3d at 1098-1099. This burden is met once a claimant establishes that a physical or mental impairment prevents the claimant from engaging in past relevant work. 20 C.F.R. § 416.920(a)(4). If a claimant cannot perform past relevant work, the ALJ proceeds to step five, and the burden shifts to the Commissioner to show (1) that Plaintiff can perform other substantial gainful activity and (2) that a significant number of jobs exist in the national economy which Plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1497-1498 (9th Cir. 1984). If a claimant cannot make an adjustment to other work in the national economy, the claimant will be found disabled. 20 C.F.R. § 416.920(a)(4)(v).

ADMINISTRATIVE DECISION

On September 29, 2020, the ALJ issued a decision finding Plaintiff was not disabled as defined in the Social Security Act.

At step one, the ALJ found Plaintiff had not engaged in substantial gainful activity since November 1, 2018, the amended alleged disability onset date. Tr. 17.

At step two, the ALJ determined Plaintiff had the following severe impairments: schizoaffective disorder, a depressive disorder, attention deficit-hyperactivity disorder (ADHD), diabetes, and obesity. Tr. 17.

At step three, the ALJ found Plaintiff did not have an impairment or combination of impairments that meets or medically equals the severity of one of the listed impairments. Tr. 18.

The ALJ assessed Plaintiff's Residual Functional Capacity (RFC) and found Plaintiff could perform medium exertion level work with the following limitations: he can lift and/or carry up to 25 pounds regularly or frequently and 50 pounds occasionally; he is unable to climb ladders, ropes, or scaffolds, or otherwise be exposed to unprotected heights (due to his obesity); and he requires a low stress, predictable work environment with only occasional, simple work place changes, no

1 production, pace, or sales quotas or conveyor belt work, and only brief, no more
2 than superficial, interaction with the general public, coworkers, and supervisors,
3 with whom he could have more contact during training periods. Tr. 19.

4 At step four, the ALJ found Plaintiff was able to perform his past relevant
5 work as a prep and short order cook. Tr. 24.

6 The ALJ alternatively determined, at step five, that based on the testimony
7 of the vocational expert, and considering Plaintiff's age, education, work
8 experience, and RFC, Plaintiff was capable of making a successful adjustment to
9 other work that exists in significant numbers in the national economy, including
10 the jobs of laundry worker; stores, laborer; bus person; courier; office helper; and
11 mailroom clerk. Tr. 24-26.

12 The ALJ thus concluded Plaintiff was not under a disability within the
13 meaning of the Social Security Act at any time from November 1, 2018, the
14 amended alleged disability onset date, through the date of the ALJ's decision,
15 September 29, 2020. Tr. 26.

16 ISSUES

17 The question presented is whether substantial evidence supports the ALJ's
18 decision denying benefits and, if so, whether that decision is based on proper legal
19 standards.

20 Plaintiff asserts the ALJ erred by: (1) failing to provide specific, clear, and
21 convincing reasons for discounting Plaintiff's allegations of mental dysfunction;
22 and (2) failing to provide specific and legitimate reasons for discounting the
23 treating medical source opinion of Michelle Taylor, A.R.N.P., and the examining
24 medical source opinion of Thomas Genthe, Ph.D. ECF No. 17 at 2.

25 DISCUSSION

26 A. Medical Opinion Evidence

27 Plaintiff asserts the ALJ erred by failing to properly consider the medical
28 opinion evidence of record. ECF No. 17 at 10-18. Plaintiff specifically asserts the

1 ALJ erred by failing to provide specific and legitimate reasons for discounting the
2 examining opinions of Dr. Genthe and treating opinions of Nurse Taylor. ECF No.
3 17 at 10-18.

4 Defendant responds the ALJ reasonably evaluated the medical opinion
5 evidence pursuant to the new regulations. ECF No. 18 at 9.

6 For claims filed on or after March 27, 2017, new regulations apply that
7 change the framework for how an ALJ must weigh medical opinion evidence.
8 *Revisions to Rules Regarding the Evaluation of Medical Evidence*, 2017 WL
9 168819, 82 Fed. Reg. 5844-01 (Jan. 18, 2017); 20 C.F.R. § 416.920c. The new
10 regulations provide the ALJ will no longer give any specific evidentiary weight to
11 medical opinions or prior administrative medical findings, including those from
12 treating medical sources. 20 C.F.R. § 416.920c(a). Instead, the ALJ will consider
13 the persuasiveness of each medical opinion and prior administrative medical
14 finding, regardless of whether the medical source is an acceptable medical source.
15 20 C.F.R. § 416.920c(c). The ALJ is required to consider multiple factors,
16 including supportability, consistency, the source's relationship with the claimant,
17 any specialization of the source, and other factors (such as the source's familiarity
18 with other evidence in the file or an understanding of Social Security's disability
19 program). *Id.* The regulations make clear that the supportability and consistency
20 of the opinion are the most important factors and the ALJ must articulate how they
21 considered those factors in determining the persuasiveness of each medical opinion
22 or prior administrative medical finding. 20 C.F.R. § 416.920a(b). The ALJ may
23 explain how they considered the other factors, but the ALJ is not required to except
24 in cases where two or more opinions are equally well-supported and consistent
25 with the record. *Id.*

26 ///

27 ///

28 ///

1 Supportability and consistency are further explained in the regulations as
2 follows:

3 (1) *Supportability*. The more relevant the objective medical evidence
4 and supporting explanations presented by a medical source are to
5 support his or her medical opinion(s) or prior administrative medical
6 finding(s), the more persuasive the medical opinions or prior
administrative medical finding(s) will be.

7 (2) *Consistency*. The more consistent a medical opinion(s) or prior
8 administrative medical finding(s) is with the evidence from other
9 medical sources and nonmedical sources in the claim, the more
10 persuasive the medical opinion(s) or prior administrative medical
finding(s) will be.

11 20 C.F.R. § 416.920c(c).

12 **1. Thomas Genthe, Ph.D.**

13 On December 10, 2018, Thomas Genthe, Ph.D., completed a
14 psychological/psychiatric evaluation of Plaintiff. Tr. 362-367. Dr. Genthe
15 diagnosed schizoaffective disorder, depressive type, and
16 attention-deficit/hyperactivity disorder, combined presentation, and opined
17 Plaintiff had moderate to marked limitations in several categories of work-related
18 mental functioning with an overall severity rating of marked. Tr. 364-365. Dr.
19 Genthe wrote that “a period of no less than 12 months may likely be needed to
20 address his treatment needs at least moderately well, and help him regain the
21 necessary emotional functioning to resume fulltime work related activities.”
22 Tr. 365.

23 The ALJ found the opinion of Dr. Genthe was not persuasive. Tr. 23. The
24 ALJ determined Dr. Genthe’s assessment was not consistent with Plaintiff’s
25 treatment records, which showed he reported doing well and was looking for
26 employment; noted Dr. Genthe estimated the duration of the Plaintiff’s impairment
27 limitations was 12 months and that vocational training or services would minimize
28 or eliminate barriers to employment; indicated Plaintiff’s test results could only be

1 assumed to be invalid, which would render any associated assessment suspect; and
2 mentioned Dr. Genthe's assessment was a one-time evaluation. Tr. 23.

3 First, the ALJ failed to specifically articulate how he considered Dr.
4 Genthe's evaluation in terms of supportability, as required by the revised
5 regulations. 20 C.F.R. § 416.920c(b). In any event, the undersigned finds the
6 ALJ's rationale with respect to his entire analysis of Dr. Genthe is not supported by
7 substantial evidence. *See infra*.

8 Regarding consistency, the ALJ stated only that the opinion was not
9 consistent with Plaintiff's treatment records, which show he reported doing well
10 and was looking for employment. Tr. 23. However, cycles of improvement and
11 debilitating symptoms are a common occurrence with mental health issues, and it
12 is error for an ALJ to pick out isolated instances of improvement over a period of
13 months or years and to treat them as a basis for concluding a claimant is capable of
14 working. *See Garrison v. Colvin*, 759 F.3d 995, 1017 (9th Cir. 2014) citing
15 *Holohan v. Massanari*, 246 F.3d 1195, 1205 (9th Cir. 2001) ("[The treating
16 physician's] statements must be read in context of the overall diagnostic picture he
17 draws. That a person who suffers from severe panic attacks, anxiety, and
18 depression makes some improvement does not mean that the person's impairments
19 no longer seriously affect her ability to function in a workplace."). Furthermore,
20 contrary to the ALJ's finding, Plaintiff was not looking for work during the
21 relevant time period in this case. Rather, the record reflects Plaintiff reported he
22 would begin looking for work during an appointment in February 2014, Tr. 537,
23 two years prior to the initial alleged onset date and over four years prior to the
24 amended disability onset date. The ALJ's interpretation of Dr. Genthe's report as
25 being inconsistent is not supported by substantial evidence.

26 Next, contrary to the ALJ's assertion regarding the duration of Plaintiff's
27 impairment limitations lasting only 12 months, Tr. 23, the report from Dr. Genthe
28 is more nuanced. While it is correct that where the form first called for a specific

length of time of anticipated impairment, Dr. Genthe inserted “12 months,” Tr. 365, in his summary and conclusions for the same section on the same page, he clearly stated “a period of **no less than 12 months** may likely be needed to address his treatment needs at least moderately well.” *Id.* (emphasis added). *See* 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A) (an individual shall be considered disabled if he has an impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months). Dr. Genthe’s assessed limitations would meet the duration requirements of the Act.

With regard to the ALJ’s finding that Dr. Genthe’s test results could only be assumed to be invalid, which would render any associated assessment suspect, Tr. 23, Dr. Genthe did find the results of the Personality Assessment Inventory (PAI) were invalid and that no clinical interpretation was provided, Tr. 367. However, Dr. Genthe reported there were several potential reasons for this invalid test, including “reading difficulties, careless or random responding, marked confusion, or failure to follow the test instructions.” Tr. 367. Moreover, Dr. Genthe only determined that one portion of his larger evaluation, that portion specifically addressing the PAI panel of questions, was invalid. As asserted by Plaintiff, ECF No. 17 at 15-16, the remainder of the evaluation produced valid indicators of Plaintiff’s mental functioning and supported Dr. Genthe’s opinion. Tr. 362-367. Even though one aspect of Plaintiff’s mental status exam was invalid, it does not negate the other findings of the evaluation or Dr. Genthe’s professional assessment.

Finally, the ALJ’s rejection of Dr. Genthe’s opinion because it was “a one-time evaluation,” Tr. 23, was not a valid basis for rejecting the opinion. *See e.g. Gonzalez v. Berryhill*, 2018 WL 1415169 at *3 (C.D. Cal. 2018) (The ALJ’s finding that a doctor’s opinion was based on a one-time examination is not a specific and legitimate reason to reject the opinion. By definition, an examining source will often have based his or her conclusions on a single examination.);

1 *Lopez v. Colvin*, 194 F.Supp.3d 903, 917 (D. Ariz. 2016) (Fact that a doctor’s
 2 “opinion was based on a single examination is relevant, but is not, standing alone,
 3 a legitimate reason for rejecting his opinion. It simply cannot be said that every
 4 one-time examination is inaccurate.”). Furthermore, the current regulatory
 5 framework provides that the ALJ may not exclude a medical source merely
 6 because the source falls within a particular category; i.e., a treating physician, a
 7 one-time examining physician, or a non-examining/reviewing physician.

8 Based on the foregoing, the Court finds the ALJ’s analysis as to Dr. Genthe
 9 is not supported by substantial evidence. Because the ALJ erred by failed to
 10 adequately evaluate Dr. Genthe’s opinion, this matter must be remanded.³

11 **2. Michelle Taylor, A.R.N.P.**

12 On November 4, 2019, Nurse Taylor completed a mental source statement
 13 form for Plaintiff. Tr. 454-456. Ms. Taylor checked boxes indicating Plaintiff had
 14 several moderate and marked mental limitations.⁴ *Id.* She additionally found that
 15 Plaintiff would likely be off task over 30% of the time during a 40-hour work week
 16 and would likely miss 3 to 4 or more days per month. Tr. 456.

17 The ALJ determined the assessment of Nurse Taylor could not be found
 18 persuasive. Tr. 23-24. The ALJ held Nurse Taylor’s indications were
 19 contradictory; specifically, her indication that Plaintiff was “severely” limited for
 20 responding appropriately to changes in the work setting, contradicted her

21
 22 ³The Court notes that the commentary to the revised regulations specifically
 23 indicates that the intent in the new rules was “to make it clear that it is never
 24 appropriate under our rules to ‘credit-as-true’ any medical opinion.” *Revisions to*
 25 *Rules Regarding the Evaluation of Medical Evidence*, 2017 WL 168819, 82 Fed.
 26 Reg. 5844, 5858 (Jan. 18, 2017).

27 ⁴Nurse Taylor also assessed Plaintiff’s ability to respond appropriately to
 28 changes in the work setting as “severely limited.” Tr. 455.

1 indications that Plaintiff was only “moderately” limited traveling in unfamiliar
2 places, using transportation, responding appropriately, taking precautions for
3 normal hazards, and setting realistic goals and making plans independently of
4 others. Tr. 23-24. The ALJ also found Nurse Taylor provided no associated
5 explanation or narrative, the assessed limitations were not consistent with
6 Plaintiff’s treatment records, and Nurse Taylor marked that Plaintiff was only
7 “moderately” limited in each of the four broad areas of functioning under
8 paragraph B. Tr. 24.

9 As this claim is being remanded for further consideration of the
10 persuasiveness of Dr. Genthe’s opinion, the Court finds, without discussion, that
11 the ALJ shall also be directed to reevaluate Nurse Taylor’s opinion regarding
12 Plaintiff’s functioning and readdress its supportability and consistency with other
13 evidence in the record. However, the Court is compelled to comment that a
14 medical professional’s opinion regarding one functional limitation is separate and
15 distinct from his or her opinion as to other functional limitations; therefore, the
16 ALJ’s finding that Nurse Taylor’s “indications are oddly contradictory,” is plainly
17 not supported.

18 **B. Plaintiff’s Subjective Complaints**

19 Plaintiff also contends the ALJ erred by failing to provide specific, clear,
20 and convincing reasons for discounting his allegations of mental dysfunction.
21 ECF No. 17 at 4. Defendant responds the ALJ reasonably evaluated Plaintiff’s
22 symptom testimony. ECF No. 18 at 2.

23 It is the province of the ALJ to make credibility determinations. *Andrews*,
24 53 F.3d at 1039. However, the ALJ’s findings must be supported by specific
25 cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990). Once
26 the claimant produces medical evidence of an underlying medical impairment, the
27 ALJ may not discredit testimony as to the severity of an impairment because it is
28 unsupported by medical evidence. *Reddick*, 157 F.3d 715, 722 (9th Cir. 1998).

1 Absent affirmative evidence of malingering, the ALJ's reasons for rejecting the
2 claimant's testimony must be "specific, clear and convincing." *Smolen*, 80 F.3d at
3 1281; *Lester*, 81 F.3d at 834. "General findings are insufficient: rather the ALJ
4 must identify what testimony is not credible and what evidence undermines the
5 claimant's complaints." *Lester*, 81 F.3d at 834; *Dodrill v. Shalala*, 12 F.3d 915,
6 918 (9th Cir. 1993).

7 The ALJ concluded Plaintiff's medically determinable impairments could
8 reasonably be expected to cause his alleged symptoms; however, Plaintiff's
9 statements concerning the intensity, persistence and limiting effects of those
10 symptoms were not entirely consistent with the medical and other evidence of
11 record. Tr. 20. The ALJ listed the following reasons for finding Plaintiff's
12 subjective complaints not persuasive in this case: (1) Plaintiff's mental condition
13 was stable and he was doing well on medications; (2) Plaintiff performed good
14 deeds by helping the elderly at the grocery store; and (3) Plaintiff lost his job for
15 reasons not related to his mental condition. Tr. 20.

16 While the ALJ's reasons for discounting Plaintiff's subjective complaints
17 may be supported by the evidence of record, this matter must be remanded for
18 additional proceedings to remedy the ALJ's errors pertaining to Plaintiff's
19 functioning during the relevant time period. *See supra*. Accordingly, on remand,
20 the ALJ shall also reconsider Plaintiff's statements and testimony and reassess
21 what statements, if any, are not credible and, if deemed not credible, what specific
22 evidence undermines those statements.

23 CONCLUSION

24 Plaintiff argues the ALJ's decision should be reversed and remanded for
25 additional proceedings. ECF No. 17 at 2, 19. The Court has the discretion to
26 remand the case for additional evidence and findings or to award benefits. *Smolen*,
27 80 F.3d at 1292. The Court may award benefits if the record is fully developed
28 and further administrative proceedings would serve no useful purpose. *Id.*

1 Remand is appropriate when additional administrative proceedings could remedy
2 defects. *Rodriguez v. Bowen*, 876 F.2d 759, 763 (9th Cir. 1989). Here, the Court
3 finds that further development is necessary for a proper determination to be made.

4 On remand, the ALJ shall reassess Plaintiff's mental impairments and
5 limitations, specifically taking into consideration the opinions of Dr. Genthe and
6 Nurse Taylor as discussed above. The ALJ shall also consider further developing
7 the record by directing Plaintiff to undergo a new consultative psychological
8 examination to assist the ALJ in assessing Plaintiff's functioning during the
9 relevant time period. The ALJ shall reevaluate Plaintiff's subjective complaints,
10 formulate a new RFC determination, obtain supplemental testimony from a
11 vocational expert, if necessary, and take into consideration any other evidence or
12 testimony relevant to Plaintiff's disability claim.

13 Accordingly, **IT IS ORDERED:**

14 1. Plaintiff's Motion for Summary Judgment, **ECF No. 17**, is
15 **GRANTED**.

16 2. Defendant's Motion for Summary Judgment, **ECF No. 18**, is
17 **DENIED**.

18 3. The matter is **REVERSED and REMANDED** to the Commissioner
19 for additional proceedings consistent with this Order.

20 4. An application for attorney fees may be filed by separate motion.

21 The District Court Executive is directed to file this Order and provide a copy
22 to counsel for Plaintiff and Defendant. Judgment shall be entered for Plaintiff and
23 the file shall be **CLOSED**.

24 DATED October 13, 2022.



A handwritten signature in blue ink, reading "Alexander C. Ekstrom", is written over a horizontal line.

ALEXANDER C. EKSTROM

UNITED STATES MAGISTRATE JUDGE